



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL  
ATTORNEY GENERAL

April 30, 1952

Hon. C. H. Cavness  
State Auditor  
Austin, Texas

Opinion No. V-1445

Re: Legality of the State's  
paying compensation to a  
member of a district  
board of supervisors of  
a soil conservation dis-  
trict for services ren-  
dered at the same time  
that he is receiving com-  
pensation from his dis-  
trict as an employee  
thereof.

Dear Sir:

Your request for an opinion, in part, reads  
as follows:

"In connection with our audits of the State's Soil Conservation Districts organized under the provisions of Article 165a-4, we have found some instances where Boards of District Supervisors have appointed one of their Members to certain managerial or other duties, and provided compensation for such services. Examples: responsible for renting the District's equipment; keeping the equipment repaired; collecting equipment rentals; and keeping the records of the District. The Board Member is paid either a monthly salary or a per cent of the rental receipts collected.

"During the same period the Member, as a District Supervisor, receives per diem and traveling expense out of the State's General Revenue Fund from appropriations to the State Soil Conservation Board, in accordance with the provisions of Article 165a-4, Sec. 6.

"Please advise us if it is legal for a Member of the Board of District Supervisors of a Soil Conservation District to be paid compensation from the State as a Member of a

Board of District Supervisors and at the same time be paid compensation directly from his own Board for additional services to his own Soil Conservation District."

Article 165a-4, Vernon's Civil Statutes, the "State Soil Conservation Law," was enacted by the Legislature pursuant to the duty imposed upon it by Section 59 of Article XVI of the Constitution of Texas "to conserve soil resources and prevent soil erosion," and to restore the fertility of soil, one of the State's most important natural resources, and for other closely related purposes. It provides for the creation of soil conservation districts which shall be governmental subdivisions of the State, public bodies corporate and politic, exercising governmental powers for the purposes stated therein, including the power to act as agents of the State in the performance of certain duties resting upon the State.

This statute provides that each soil conservation district so created shall be divided into five subdivisions by the State Soil Conservation Board and from each subdivision there shall be elected in the manner therein provided one supervisor. These five supervisors constitute the district board of supervisors, the governing board of the district. The statute prescribes the supervisors' tenure of office, powers and duties; fixes their compensation for certain services and mileage in connection therewith; and authorizes the supervisors to designate a chairman, a vice-chairman, and secretary of the board.

Section 6 of Article 165a-4, in part, provides:

"A supervisor may receive compensation for services not to exceed Four Dollars (\$4) for each day he shall be in attendance at the regular meetings of the Board of Supervisors and Five (5) Cents per mile for travel each way between the residence of a supervisor and the designated business office of the district supervisors. Supervisors shall be paid quarterly for their services, and may not receive compensation and mileage for any

number of days in excess of five (5) in any three-month period, except one member of each Board of Supervisors shall be entitled to receive Four Dollars (\$4) per day not to exceed two (2) days, and Five (5) Cents per mile while attending an annual State-wide meeting of supervisors to be held at a time and place to be determined by the State Soil Conservation Board.

. . .

"The supervisors may employ such officers, agents, and employees, permanent and temporary, as they may require, and shall determine their qualifications, duties, and compensation. The supervisors may delegate to their chairman, to one or more supervisors, or to one or more agents or employees, such powers and duties as they may deem proper. . . ."

The appropriations from which the per diem and mileage are to be paid supervisors "while attending an annual State-wide meeting" and for "attendance at the regular meetings of the Board of Supervisors" during each year of the current biennium are contained respectively in Items 1, 2, and 12 of Article III, House Bill 426 (the general appropriation bill), Acts 52nd Leg., R.S. 1951, ch. 499, p. 1228, at page 1424.

Subsection 10 of Section 7 of Article 165a-4 provides:

"The Supervisors shall have no power to levy taxes. . . ."

However, Section 7 specifically authorizes a board of supervisors to render numerous services to occupiers and owners of land within its district and to receive compensation therefor for the use and benefit of the district.

They are also authorized:

". . . to acquire by gift, grant, bequest, demise, or otherwise, any

property, real or personal; to receive income from such properties and to expend such income in carrying out the purposes and provisions of this Act; . . . to sell, lease, or otherwise dispose of any of its property or interest therein in furtherance of the purposes of this Act; . . . to accept donations, gifts, and contributions in money, services, materials, or otherwise, from the United States, or any of its agencies, or from this State, or any of its agencies, and to use and expend such moneys, services, materials, or contributions in carrying on its operations."

The funds of a district are those derived from one or more of the sources mentioned in Article 165a-4, and may be designated as "local funds" or those granted to it by the State.<sup>1</sup> It is from one or both of these funds that a board of supervisors pays one of its members for services such as those mentioned in your letter. Neither of these funds is deposited in the State Treasury. The local funds of the district are under the control of its board of supervisors. The funds granted by the State to a district are required by the terms of the grants to be deposited "with a State or National bank or banks" and may be withdrawn only on approval of its board of supervisors by check or order signed by the chairman and secretary of the board.

Section 40 of Article XVI of the Constitution of Texas provides:

"No person shall hold or exercise, at the same time, more than one office of emolument. . . ."

Section 33 of the same Article declares:

"The accounting officers of this State shall neither draw nor pay a warrant upon the Treasury in favor of any

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<sup>1</sup> Cf. H.B. 97, Acts 51st Leg., R.S. 1949, ch. 540, p. 1000 (Art. 165a-8, V.C.S.); H.B. 190, Acts 52nd Leg., R.S. 1951, ch. 497, p. 1206 (Art. 165a-9, V.C.S.).

person, for salary or compensation as agent, officer, or appointee who holds at the same time any other office or position of honor, trust or profit, under this State or the United States.  
... ."

This section contains numerous exceptions, but none of them is applicable to the situation under consideration here.

There is a well recognized distinction between an office and a position of employment. This distinction is clearly stated in Knox v. Johnson, 141 S.W.2d 698, 700 (Tex. Civ. App. 1940, error ref.), as follows:

"It may be stated, as a general rule deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements."

When the numerous provisions of Article 165a-4 are considered in the light of the foregoing generally accepted rules for determining whether a public position is an office or one of employment, we think the position held by a supervisor of a soil conservation district is a public office emolument, and the holder of such an office is, of course, a public officer.

It is also our opinion that the position held by a supervisor of a soil conservation district who has been employed by his board of district supervisors to perform certain duties for his district, such as those mentioned in your letter, for which he is compensated by the board from funds belonging to the district, is that of a public employee, a "position of honor, trust or profit under this State," founded on contract between him and his board of supervisors.

Consequently, the prohibitive provisions of Section 33 of Article XVI of the Constitution are applicable here and impel us to answer your question in the negative.

This opinion is limited to the specific question submitted. The question of authority of a board of supervisors of a soil conservation district to employ one of its members to perform services for the district and pay him therefor out of the funds of the district is not before us, hence we express no opinion thereon.

SUMMARY

A member of a district board of supervisors of a soil conservation district created under Article 165a-4, V.C.S., is a public officer. When such a member is employed by his board to render managerial or other services for his district and for which he receives compensation from the funds of the district, he holds at the same time an office of emolument and also a position of honor, or trust, or profit under this State. Consequently, he cannot be paid by the State for any official services which he may have rendered during the time he was so employed. Tex. Const. Art. XVI, Sec. 33.

APPROVED:

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BWB:wb

Yours very truly,

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